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THE MALABAR MARRIAGE BILL.

Undoubtedly one of the most noteworthy attempts at legislation in recent times in the Southern Presidency is the measure for providing a form of marriage for those inhabitants of Malabar and South Canara who are governed by the system of law familiarly known as *Marumakatayam* or Nepotism; and the attempt is the more worthy of attention because it is made by one subject to that peculiar system of law itself. To sociologists Malabar has always been a land of curiosity owing to the prevalance of customs that are characteristic of *Marumakatayam,* and without doubt many scholars regard the Nairs and other classes governed by Nepotism as a race of semi-savages that have somehow managed to survive in the midst of more civilised peoples. To one unacquainted with the unusual conditions under which Malabar has flourished, such an inference must seem most natural, for the establishment of a regular marriage and inheritance in the line of one's own children are amongst the earliest modifications which the progress of civilisation has almost invariably worked in the primitive condition of society. Yet the truth is that the Nairs and other followers of *Marumakatayam* in point of education, knowledge, culture, and refinement, are quite on a par with their brethren around them, and their *Marumakatayam* is an excrescence on their body social rather than an index to its true nature. The most forward and the best educated of this community have been for a long time chafing against the system and endeavoured to free themselves from a system which they find to be an obstacle to every step in their economical and social progress. The present endeavour to effect a modification in the system by means of legislation must be regarded as the result of a struggle which commenced long ago and which probably would have silently if somewhat slowly effected its object but for

the rigidity which British laws and the British administration have imparted to the ancient customs of this country. The Hon. Mr. C. Sankaran Nair's Bill led to a great deal of controversy in the public press, and it disclosed another instance of the familiar truth that the rank and file of a community can never be induced altogether to admit that there is anything in their customs capable of improvement. The bill evoked a great deal of opposition from the more conservative portion of the community, *i.e.*, from the richer, the more aristocratic, and the more uneducated sections of it. This was of course to be expected. But another source of difficulty arose of a somewhat unusual kind. Even those who knew better opposed the legislation, because the enactment of such a law, they thought, would amount to the admission of the present existence of serious evils of a kind, which people generally are desirous of concealing both from friends and foes. To ask for a law creating the relationship of marriage was to admit its non-existence at present. We can well understand the unwillingness to make such an admission. The inference drawn from it, uncomplimentary to the community, would be larger than the facts really warrant, and in the delicate matters to which the question relates, people naturally are very reserved. The Government of India was unwilling to sanction the legislation without sounding the sentiments of the community likely to be affected by it, and taking evidence as to the alleged evils of the existing system and consequently suggested the appointment of a Commission for the purpose. The Commission accordingly appointed by the Madras Government consisted of the Hon. Sir T. Muthusami Aiyar, the Hon. Mr. C. Sankaran Nair, the mover of the Bill, Mr. Winterbotham, the Collector of Malabar, and four other gentlemen, prominent representatives of the *Marumakatayam* community. A great deal of evidence was taken on the subject, but we doubt whether the reports and memoranda of the members of the Commission or the Appendices to them containing the recorded information on the subject, are calculated to give a true, adequate and accurate picture of *Marumakatayam* society in Malabar. An individual wishing to be fully informed on the subject which the commission was investigating would not fail to seek knowledge among the classes that live amidst the *Marumakatayam* community, whose information is likely to be accurate and who are likely

to be willing to impart it freely. The followers of Nepotism, however respectable and truthful they may be, must speak on the subject with great reserve, but the Commission after due deliberation resolved not to examine any strangers except the Nambudris, as the result of doing so would have been "to rouse caste antipathies and to stir up bad blood." In conceiving the reality therefore from the likeness we must remember that a good deal of the shade has been left out. We must observe that the President's memorandum also is very reticent about the actual state of *Marumakatayam* society, whether the present moral and economic condition of the Malayalees and their habits and conduct in sexual matters are such as to necessitate legislation, on the most paramount of all grounds, the advancement of the cause of morality; and his recommendation of legislation in the matter is based mainly on considerations of a comparatively theoretical nature, such as the right of every one of Her Majesty's subjects to contract a legal marriage. The majority that signed the report on the other hand seem to be conscious that the strongest ground on which legislative interference can be sought is the necessity for it, and have therefore in some measure pointed out that the moral as well as the economic results of *Marumakatayam* are far from satisfactory. The orders of the local Government and the Government of India are more or less in the shape of comments on the President's minute and approve in the main of the scheme of legislation put forth by him. The Hon. Mr. C. Sankaran Nair was directed to redraft his Bill so as to embody the modifications suggested by Sir T. Muthusami Aiyar and the Government, and we believe a fresh bill is now ready for introduction into the Council. The subject of the legislation is novel and its importance demands a somewhat critical examination of its main provisions. But before undertaking this task, it is necessary for the sake of those that may not possess much acquaintance with the *Marumakatayam* system to make a very few observations as to its history in Malabar.

Authentic history has yet had nothing to say as to the origin of Nepotism in *Kerala* extending from Gokarnam to Cape Comorin and embracing the modern districts of South Canara and Malabar in British India and the Native States of Cochin and Travancore. Tradition ascribes it to the sage and hero Parasurama who reclaimed *Kerala* from the sea. The land was partitioned out

by the sage amongst the Rajahs and the Brahmins known as the Nambudris. To prevent the disruption of estates, Parasurama ordained that only the eldest brother in a Nambudri family shall ordinarily marry and to gratify the sexual needs of the other members, he enacted that they should be at liberty to form alliances with Sudra women. The object of the rule required that the children born of such unions should have no right to the property of their Brahmin fathers and that the Sudra women themselves should not claim the rights and status of wives. The obligation to maintain them and their children should be cast on the family of their birth and they should have no right to live with or be maintained by those who consorted with them; in fact the Brahmin should be enabled to satisfy his sexual passion without incurring any of the obligations of lawful wedlock, and without having to expend anything out of the family stock. If the Sudra women were to be kept without marriage it followed that the men also should not marry. They were also to form connexions similar to the Brahmins and with the like obligations, or rather absence of obligations. *A Marumakatayam* tarwad consists consequently of the mother, brothers, sisters, and the issue of such sisters, and the issue of their female issue and so on. Relationship always depends upon descent from the same female ancestor and there are no agnate relations at all. Partition except with the consent of all is unknown. We shall not pause to enter into the details of the social organisation; we must ask our readers to consider what is likely to be the state of morality under such a system. The husband and wife live apart, the wife has no civil claims against the husband, the children have no rights against their father, the father cannot claim the guardianship of his children, the husband and wife may divorce each other at will, no reasons need be assigned and no formality observed. Such undoubtedly was the state of matters in former times, although time and the refining influences of civilisation led to some changes in course of time. We must add that chastity is not a virtue enjoined by the religion, and Parasurama is supposed to have expressly tolerated laxity. Is it likely that the state of morality can be high in these circumstances? According to the report of the Commission polyandry prevailed till lately in various parts of the country and if that was tolerated, the general level of morality could not be high. How is it that such a state of

things has been allowed to continue so long ? We have not been able to find any instance of an organised community living under the law of Nepotism within historic times in other parts of the world. In primitive times and still among savages, we are not unfamiliar with the absence of marriage. We cannot find any case of a community becoming civilised and still remaining without marriage but organising a rule ot descent with regard to property where the wife and children are not recognised. The followers of *Marumakatayam* in Malabar regard the *Vedas* and the *Sastras* as containing the will of the Gods and sages and the quint essence of all wisdom and yet they have not yet adopted the precepts of these sacred books in regard to the most important relations of life. How is the continuance of such a system to be explained ?

The main causes we think were the adoption of *Marumakatayam* very early by the Royal families of Malabar which made it in some sense a part of the public law of the country and the intimate connection into which the Sudras of Malabar were early brought with the Brahmins, the priestly class. The influence of the latter has always been strong throughout India, but in Malabar it has been far stronger than elsewhere owing to the Brahmins being also the owners of most of the land in the country. The chief source of subsistence to the Sudras is the land, and they cultivate it under the Brahmins, sometimes as lessees for a period of twelve years under favourable conditions, but often as mere tenants from year to year. In either case, their material interests are largely dependent on the kindness of the Nambudris. Besides, the bond of religious union is also closer than usual in Malabar between the priest and the disciple. The Nambudris, unlike the Brahmins in other parts of India, require the help of the Sudras at almost every religious ceremony of importance, and the Sudra, we need hardly say, is utterly dependent on the Brahmin. The religious upheavals which from time to time have served to remind the people elsewhere of the real equality of all classes and to inspire the Sudras with a certain spirit of social and religious independence, never penetrated the isolated atmosphere of Malabar. Owing to these and several other causes the influence of the Brahmins in Malabar is still all but supreme. It is a noteworthy fact that in the present day *Marumakatayam* survives chiefly only amongst the classes with whom the Nambudris can form alliances, *i.e.*, amongst the

Kshatrias and the Sudras and the intermediate classes, although in North Malabar the custom still prevails in the Tiyan and Mukuva (*i.e.,* fishermen) classes. The classes lower than the Sudras generally have a legal marriage, and their rule of inheritance is *Makkatayam*. We believe that even the Cherumars and Puliars, *i.e.,* the Pariahs of the district, can claim to be superior in this respect to the classes next to the Brahmins. It is hardly likely that nepotism did not at one time regulate the social life of the lower castes. The probabilities are that they succeeded very early in shaking off the system, but the classes that became associated with the Brahmins were unable to do so, as the Brahmins would necessarily oppose any such attempt. The Nambudris are the most conservative sect amongst Brahmins in India, and altogether devoid of all modern culture, and they still regard the Sudras as bound to minister to their own pleasures, and having no title to live a pure life. It will be clear from these facts that it must be extremely difficult for the Sudras to make substantial progress with their present laws and environments. These, it may be said, are only *a priori* arguments, but the experience of those who are closely acquainted with their social life confirms their cogency. We have no wish to traduce the large *Marumakatayam* community of Kerala and we do not mean to descant on the state of morality which is the result of the *Marumakatayam* system. We are also aware that Europeans who have lived in Malabar as officials have sometimes formed a high opinion of the conjugal morality of the Sudras of the district but the opinion of native gentlemen acquainted with Malabar has generally been unfavourable. We would remind the followers of *Marumakatayam,* and all who are interested in them, that economic objections to *Marumakatayam* are unlikely to be regarded by a foreign Government afraid of any interference with the social customs of its subjects, as sufficient ground for legislation, but the interests of morality are paramount, and the English Government cannot refuse a permissive law to people who want it in order to remove the obstacles to their living better and purer lives. We for our part thoroughly sympathise with the object of the Bill and support the demand for legislation, and though we are thoroughly convinced that economically *Marumakatayam* is working incalculable mischief as pointed out in the Report of the Commission, paras. 52 to 58, we would put forward as the strongest argument in favour of the Bill

that it is likely to improve the conjugal morality of those for whose benefit it is intended—nay, that it is necessary to remove the present stain on their moral character.

We have already observed that many object to the Bill on the ground that marriage already exists among *Marumakatayam* Sudras, and that the Bill is therefore unnecessary. One of the members of the Commission, Mr. Chandu Menon, is of this opinion. We do not intend to deal with this view at length, but it is noticeable that those who hold it agree that the Talikattu (or the ceremony of tying the Tali) and the ceremonies accessory thereto which are very similar to the marriage ceremony among Brahmins, and which take place before a girl attains puberty are not the marriage ceremony. They urge that subsequently before a girl accepts a consort there is always some ceremony, such as presenting cloths to the bride, &c., which may be taken to be a marriage ceremony, whether it be of a religious nature or not. But the question whether there is marriage or not, obviously does not depend on whether there are certain ceremonies performed or not, but the nature, incidents, and consequences of the conjugal unions formed. On this we do not think it necessary to add any thing to what the learned president has said. We think he has conclusively proved that there is no marriage amongst *Marumakatayam* followers which the law can recognise. He observes "It is no doubt true that there is a customary marriage and that a contract may be inferred from its incidents. But having regard to the fact that in theory either party may arbitrarily repudiate it at will, the obligation created by it is one which either party may ignore at his or her pleasure, and there is no uniform formality which may be accepted as a customary regulation fixing its duration throughout Malabar. It is a contract of which the breach, though checked in some measure by public opinion is neither invariably nor effectually restrained by a definite rule. Such a contract is a contradiction in terms and is not likely to be accepted as creating a binding tie until and unless the practice of divorce is regulated in some mode so that the obligation may invariably be taken to subsist until the regulation is complied with." The majority who signed the Report are of the same opinion. In para. 28 of the Report they express their conclusion as follows:—" . . The commission are thus forced to the conclusion that the principles of the

Marumakatayam law do not recognize the institution of marriage. If *Marumakatayam* is to be their guide, it permits its followers to copulate *more ferarum* with no other restriction than that the man shall be of equal or higher caste than the woman. They are all, or nearly all of them, better than their custom, and the majority (as we are told and believe) cleave to one woman for life. But continued co-habitation does not under any law which concerns us, raise the woman to the status of wife; and the parties however long they co-habit acquire under their own system no rights or duties which the law can recognize." The Talikattu ceremony is really of a religious nature and in all essential respects similar to the marriage ceremony among Nambudris, but it is intended as admitted by almost all the witnesses to create no civil rights between the parties to it, but only, as some witnesses say, to invest the girl as it were with womanhood. This of course is a mere conjecture and has no parallel elsewhere in the Hindu community. Some say that it corresponds to the betrothal ceremony among other classes of Hindus but the ceremony goes far beyond a betrothal in form and it appears somewhat ludicrous to talk of the betrothal of a girl to a man who is never intended to have any right over her. Mr. Winterbotham thinks "that most Europeans will probably find this explanation of the ceremony unintelligible and that they will persist in regarding the Brahmin Tali-tier as a relic of the time when the earth Gods were entitled to the first fruits, and when it was considered the high privilege, of every Sudra maid to be introduced by them to womanhood." We are afraid that this explanation is merely fanciful. It assumes moreover that the Tali was originally tied by the Brahmin in all cases which is extremely improbable. We think that the true reason is to be found in the desire of the Sudras to imitate the Brahmins, which is strong everywhere, but perhaps stronger in Malabar than in other places. The Nambudris had of course no objection to grant the Sudra this indulgence, for it was an occasion of feasting and profit to themselves. But whatever the origin of the Talikattu ceremony may be, it is generally admitted that it does not create the tie of marriage. On the whole therefore there is not much room for doubt that the institution of marriage does not exist amongst the *Marumakatayam* community.

The Madras Government agree that legislation is necessary and advisable and their reasons are stated as follows. "The classes

governed by the *Marumakatayam* law form sexual connexions which are, at the time of commencing them, intended to be permanent until the death of either of the parties, and which in the great majority of cases are so. These connexions are publicly formed and socially recognized and are accompanied by ceremonies of a characteristic kind which have nothing in them of a religious element, but which otherwise are as much marriage ceremonies and entitled to the same respect as marriage ceremonies elsewhere; the connexions have however no legal consequences and as they are terminable at the will of either party, they receive no legal recognition or protection. His Excellency in Council considers that marriages performed under the *Marumakatayam* law are entitled to legal recognition and protection and that the mere statement of the case as above is sufficient to show the propriety of legislating on the subject. The court's have hitherto refused to recognize these social marriages in Malabar as legal marriages and it will be observed from para. 15 of his memorandum that the President is of opinion that such recognition is not likely to be accorded in the future." The Government of India accepts the opinion of the Madras Government. The reasoning of the Government appears to be that there is social marriage in Malabar without legal consequences. As the conjugal connexion is recognized by the people as permanent, it is desirable to recognize it as marriage by legislation. This reasoning does not appear to us to be satisfactory. The law has not only to recognize the existing connexion as marriage, but has to attach to it consequences which neither legally nor even socially flow from it, such as rights of maintenance and inheritance, right of guardianship over the children, &c. It is not the fact that the law has only to give validity to customs that already exist but are not recognized, but taking advantage of the permanency of the conjugal connexion, it has to attach to it a number of rights and obligations that even socially are not recognized or admitted as pointed out by the commission and are in fact opposed to recognized rights existing in other members related to the husband or wife, *viz.*, the members of their respective tarwads. The majority of the commission pointed out that while the existing customs give rise to no rights, the present distribution of rights is a great economical evil and that the existing conception of conjugal

morality is a bar to progress. It is to some extent to be regretted that the Government in their observations do not recognize these evils, because in our opinion there are far stronger grounds for legislation than the propriety of according legal recognition to a marriage that socially already exists and according legal validity to incidents already enforced by the community. We are not aware that the Bill has as yet obtained the approval of the Secretary of State, and we hope that the section of the community interested in seeing the legislation accomplished will take care to satisfy the Secretary of State that there are far stronger reasons in support of the contemplated legislation than those accepted by the Government here.

SECTION 21 OF ACT XV OF 1887.

We propose in this article to discuss the scope of S. 21 of the Limitation Act. Sections 19 and 20 of the Act lay down the effect of acknowledgment of liability in respect of any property or right, of payment of interest on a debt or legacy, and of part-payment of the principal of a debt, in giving a fresh starting point to the period of limitation provided by the second column of the second Schedule to the Act. Now if Ss. 19 and 20 stood alone without being followed by S. 21 it would be a difficult problem indeed to determine the effect of acknowledgment or payment by one of several persons jointly liable, upon the liability of himself and the rest. The grammatical construction of the words of the section, and the analogy of the language of Ss. 7 and 13 of the Act might lead to the conclusion that unless all joined in the acknowledgment or payment it would have no operation on the statute, (see 4 M. L. J, p. 50). Reason and principle would however require that the acknowledgment or part-payment should at least operate to save the statute against the person making it. But the English cases before Lord Tenterden's Act went further than this. They laid down that the acknowledgment, or part-payment of the co-contractor operated to save the statute against all. If the analogy of those decisions were followed, Ss. 19 and 20 standing by themselves would have necessitated a construction at variance with their grammatical import. But the framers of the Indian Limitation Act have by S. 21 attempted a solution of the difficulty which it is our business now to examine.

The section runs in these terms. "Nothing in Ss. 19 and 20 renders one of several joint-contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made, by, or by the agent of, any other or others of them." The rule enacted by this section found a place in the earlier Limitation Acts also in force in this country but in a more limited form. Section 4 of Act XIV of 1859 did not recognize part-payment or payment of interest as giving a fresh starting point (see *Raja Esvara Das* v. *Richardson,* 2 M. H. C. R, 84 and *Khwaja Muhammad Janula* v. *Venkatarayar,* 2 M. H. C. R, 79) and therefore S. 4 which recognized the force of acknowledgment merely provided that if more than one person be liable in respect of a debt or legacy none of them shall become chargeable by reason only of a written acknowledgment signed by another of them. Although Act IX of 1871 recognized payment of interest and part-payment (S. 21) as giving a fresh period to the creditor it did not deal with the effect of payment by one of the joint obligees upon the running of limitation as regards the others. Explanation 2 to S. 20 of that Act merely laid down that nothing in that section rendered one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them. In Act XV of 1877 the principle of this explanation has been extended to cases of payment by one of several co-contractors, or partners or co-executors.

The history of English legislation on the question is in some respects similar. The English Courts have for a great many years implied a fresh promise to pay from an acknowledgment or payment of interest or part–payment of the principal of a debt. And from the time of the decision in *Whitcomb* v. *Whiting,* 1 Sm. L. C, 9th Ed., p. 618, a case decided by Lord Mansfield, it was the law in England that where one of several joint-contractors acknowledged a debt or paid the interest thereon or part of the principal, there was a fresh starting point for the statute not merely in respect of the person acknowledging or paying but also in respect of his co-contractor or co-contractors; see Buswell on Limitation, Ss. 57 and 58, and Darby and Bosanquet, pp. 126 and 127. This rule even received a further extension in *Jackson* v. *Fairbank,* 2 H. Bl., 340 where it was held that payment within six years by the assignee of one of two drawers of a

joint and several promissory note who had become bankrupt, of a dividend on account of the note was sufficient to prevent the other drawer from availing himself of the statute, in an action brought against him for the remainder of the money due on the note. But whether this decision was correct or not, there is no doubt that *Whitcomb* v. *Whiting* was followed in subsequent cases until the law was changed by Lord Tenterden's Act. In *Perham* v. *Raynal,* 2 Bing., 306, *Best, C.J.* following the authority of *Whitcomb* v. *Whiting* and *Perry* v. *Jackson,* 4 T. R., 516, held that an acknowledgment within six years by one of two joint-makers of a promissory note would revive the debt against the other although he had made no acknowledgment. Notwithstanding some doubts suggested by *Atkins* v. *Tredfold,* 2 B & C, 23 and *Slater* v. *Lawson,* 1 B & Ad, 396, the authority of *Whitcomb* v. *Whiting* continued unshaken. See *Burleigh* v. *Scott,* 8 B & C, 36 and *Mendersтon* v. *Robertson,* 4 Man. & Ryl., 440. *Atkins* v. *Tredfold* was, however, a case of payment of interest by one of two joint makers of a note after the death of the other and the court consisting of *Abott, C.J.* and *Bayley, Holroyd* and *Best, J.J.* held that such payment did not take the case out of the statute as regards the executor of the deceased maker. In *Slater* v. *Lawson* the payment was by the executor of the deceased maker of a note and the court held that it would not take the case out of the statute in respect of the survivor. These cases were rested on the principle that the death of one of the joint makers had severed his liability and there could be no such community between the executor of one and the other as to render payment or acknowledgment by one a payment or acknowledgment by both. They therefore left untouched the authority of Lord Mansfield's decision. Lord Tenterden's Act, 9 Geo. IV, Ch. 14 enacted in 1828 that "where there shall be two or more joint contractors, or executors, or administrators of any contractor; no such joint-contractor, executor, or administrator shall use the benefit of the said enactments or either of them so as to be chargeable in respect or by reason only of any written acknowledgment or proviso made and signed by any other or others of them." A proviso to S. 1 added that the plaintiff was not precluded from recovering against the contractor or executor making the acknowledgement. This section, however, did not touch the question of the effect of payment by one of several co-contractors or executors.

It was therefore held that Lord Tenterden's Act had not altered the law as regards the effect of such payments. In *Pease* v. *Hirst,* 10 B.& C, 122 and *Chippendale* v. *Thurston,* 4 C & P., 98, it was held that a payment of interest within six years by one of the makers of a joint and several pro-note more than six years old would take the case out of the statute as against the other maker of the note. In *Wyatt* v. *Hodson,* 8 Bing., 309, *Tindal, C.J., Park, Guesley* and *Alderson, J.J.* said "under 9 Geo. IV, Ch. 14 payment of interest within six years by one of several joint-contractors takes the debt out of the statute as against all." (See also *Channel* v. *Ditchburn,* 5 M & W, 494). As regards executors *Abbot, C.J.* held in *Tolock* v. *Dun,* 1 Ry. & M, 416 that an express promise by one executor would not take the case out of the statute as against others. *Baron Parke* seemed inclined to follow this opinion in *Scholey* v. *Walton,* 12 M & W, 510, a case which was before him in 1844; see also Darby and Bosanquet, p. 127. In this state of the authorities, the Mercantile Law Amendment Act 19 & 20 Vic., Ch. 97 was passed in 1856. Section 14 of this enactment enacted a rule with regard to payment similar to that in 9 Geo. IV, Ch. 14. It says that "when there shall be two or more co-contractors or co-debtors whether bound or liable jointly only or jointly and severally or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors, or administrators." This section coupled with S. 1 of 9 Geo. IV, Ch. 14 covers nearly the same ground as S. 21 of Act XV of 1877. Section 28 of 3 and 4 Will IV, Ch. 27 enacts a similar rule in the case of acknowledgment by one of several mortgagees.

While in the English enactments provision is only made in the case of acknowledgment by one of several co-mortgagees and acknowledgment or payment by one of several co-contractors, or executors or administrators of a contractor, S. 21 of the Indian Act applies in the case of mortgagees, executors, co-contractors, and partners. Both the English and Indian enactments, however, state that the running of time shall not be interrupted by reason *only* of the acknowledgment or payment by the co-contractor,

Although the English enactments we have referred to may be restricted in their operation to the cases of contractors, or mortgagees, or the executors of a contractor, we have no doubt that S. 21 of Act XV of 1877 deals with acknowledgments by one of several persons liable in respect of any property or right and to payments by one of several persons jointly liable to pay a debt or a legacy. Section 19 of the Act speaks of acknowledgment of liability in respect of any property or right. It stands to reason that S. 21 which refers to the earlier section should deal with the effect of acknowledgment by one of several persons jointly liable in respect of any property or right. The specific enumeration of mortgagees, co-contractors, partners, and executors does not preclude the inclusion of others jointly liable. There seems to be no reason why an acknowledgment by one of several joint mortgagors or administrators or co-parceners should not stand on the same footing in respect of its effect upon the liability of others, (see Mitra's Limitation, p. 257). As regards payment, S. 20 is limited to the payment of a debt or legacy or the interest thereon. The persons jointly liable to pay it, *viz*, co-debtors, or co-executors, or co-administrators, must also be deemed to fall within the scope of S. 21. The enumeration of some only of several classes of persons jointly liable seems to be on the principle that if even in cases in which the act of one of a set of persons is *likely* to be considered the act of others, it has not the effect of being the act of others, it is unnecessary to enumerate cases where there is no likelihood of the act of one being taken to be the act of the rest. The language of S. 21 should be made by the legislature co-extensive with that of Ss. 19 & 20.

The section presents a difficulty with regard to partners. It says that payment or acknowledgment by a partner shall not of itself operate against the other partner. Thus part-payment by one co-contractor will not revive a debt against his fellow contractor even though the latter has consented to the payment; *Jackson* v. *Woolley*, 8 Ell & Bl., 778. If a partner acts as agent of another in respect of the acknowledgment or payment there can be no doubt that such acknowledgment or payment will save the statute as against the other. Ss. 19 and 20 expressly refer to an acknowledgment or payment by an agent. In the capacity therefore of an agent, if he is one, the acts of one partner

must affect the other. Such agencey is presumed to exist in the case of mercantile partnerships and the agency terminates after the business of the partnership ceases, although the partners have been engaged in winding up the business. As was pointed out by *Melvill* and *Pinhey, JJ.*, in *Premabhai Hemabhai* v. *T. H. Brown*, 10 B. H. C. R, 319, "in the case of partnerships which are not of a mercantile character one partner has no implied authority to bind another. Thus in the case of a mining company, *Dickinson* v. *Valpey*, 10 B & C, 128, or a farming company, *Greenslade* v. *Dower*, 7 B & C, 635, or a firm of attorneys, *Hedley* v. *Bainbridge*, 3 Q. B, 316, a partner cannot bind the firm by a bill of exchange or a promissory note unless he has express authority to draw or make it." S. 251 of the Contract Act lays down the law in similar terms. "Each partner who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent. If it has been agreed between the partners that any restriction shall be placed on the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement." Illustration (*b*) to the section, gives a case of one of a firm of solicitors drawing a bill of exchange without authority in the name of the firm. The other partners are not liable on the bill. (See also Cunningham and Shephard's notes to that section). In *Way* v. *Bassett*, 5 Hare, 55 the Vice-Chancellor held that the acts of a surviving partner could not have the effect of keeping the debt alive against the estate of the deceased partner. In *Watson* v. *Woodman*, L. R, 20 Eq, 721, *Vice-Chancellor Hall* held that after dissolution of a partnership part-payment of a debt by the continuing partner could not be set up against the retiring partner as an answer to the statutes of limitation. In *Premji Ludha* v. *Dossa Doongersey*, I. L. R, 10 B, 358, the plaintiff sued as heir of his mother the partnership of which he was a member and relied on an acknowledgment in his mother's books by himself made after the business had stopped and when the partners were solely engaged in winding up. *Scott, J.* held that the presumption of agency arising in active partnership in the case of a mercantile concern no longer existed and that the acknowledgment was therefore no answer to the statute. But in *Gadu Bibi* v. *Parsotam*, I. L. R, 10 A, 418, which was a suit against a firm for

a balance due on an account signed for the firm by a member thereof, the acknowledgment was signed by the member in the ordinary course of the partnership business of the firm and the court held that he had power to bind the partners for the purpose of making such an acknowledgment and in effect purported so to bind them. The result of the decisions seems therefore to be that except in the case of a going mercantile concern or express authority, there is no agency of one partner to borrow on behalf of the rest and therefore acknowledgment or payment in other cases by one of several partners has not the effect of saving the statute as against the others. In the case of coparceners the acknowledgment or payment by the manager is the act of one having the implied authority of an agent and therefore operates to save the bar of the statute as against all the coparceners. (*Bhasker Tatya Shet* v. *Vijalal Nathu,* I. L. R, 17 B, 512, and *Chinnaya* v. *Gurunatham,* I. L. R, 5 M, 169).

There is one peculiar case which seems difficult of explanation except with reference to the language of the English enactment on which it is based. In *Richardson* v. *Younge,* L. R, 6 Ch. Ap., 478, *Mellish* and *James, L. JJ.*, held affirming the decision of *Vice-Chancellor Malins* that an acknowledgment of the title of a mortgagor given by one only of two joint mortgagees who on the face of the mortgage deed were shown to advance the money on a joint account as trustees did not keep alive the right of redemption either as against the whole property or against a moiety of it, but was wholly inoperative. The decision rests upon the language of S. 28 of 3 and 4 William IV, Ch. 27 since re-enacted in S. 7 of 37 & 38 Vic, Ch. 57. The court held that the provisions as to acknowledgments by one of several mortgagees applied only where they had separate interests either in the money or the lands. If the mortgagees had not been trustees the case would have stood very differently, for they must almost of necessity have been entitled to some distinct interests in the mortage money; see Banning on Limitation, pp. 183 and 184. The language of the English statute leads, no doubt, to this interpretation. But it seems difficult to apply this decision to the Indian enactment which refers exprssly to executors who have no separate interests in the property of the testator. Joint-trustees must, it is feared, stand on the same footing as joint-executors. It is true there is nothing

in S. 21 which necessarily leads to the conclusion that an acknowledgment by one of two co-executors binds the estate in the absence of an acknowledgment by the other. But the obvious inference suggested by the words accompanying it is that the executor acknowledging is at least liable. See Buswell on Limitation, Ss. 73 to 76. The liability of one executor or trustee when there are several is however not the liability of the estate, for the estate cannot be affected unless all the executors or all the trustees act together. It may therefore be that the law laid down in *Richardson* v. *Younge* will hold good even in this country. But we think the section ought to make this meaning clear.

NOTES OF INDIAN CASES.

Sivakami Ammal *v.* **Gopal Savundram Ayyan**, I.L.R, 17 M, 131. The decision of the Full Bench in this case takes a correct view of the rights of mortgagees under instruments of usufructuary mortgage as they are usually executed in this presidency. The covenant for payment is usually followed by a clause which provides that on default of payment on the due date, the mortgagee shall be bound to restore the lands to the mortgagor on payment of the mortgage-money in the month of Chitrai in any subsequent year. The intention of the parties to such a deed is as pointed out in the reference of the Division Bench to restrict the right of the mortgagor to pay the mortgage-money at any time after the due date and to secure that the mortgagee shall not be called upon to give up the land except before the commencement of the cultivation season. There were however certain recent decisions of the Madras High Court which held that the latter clause indicated that the mortgagee was on default of payment merely entitled to retain possession of the lands and could not sue for the money. These decisions must now be considered to be over-ruled by the Full Bench though the learned judges refrain from all allusion to them out of that excessive regard for the feelings of brother judges and the appearance of consistency which is characteristic of the Indian High Courts.

Raja Goundan *v.* **Raja Goundan**, I. L. R, 17 M, 134. The distinction between illegality and irregularity is very often a fine one and is one of those things in regard to which contradictory views are held by different judges In regard to sales for arrears of revenue under Madras Act II of 1864, this distinction has been knocked on the head by the Madras High Court following the decision of the Privy

Council in *Govind Lal Roy* v. *Ramjanam Misser*, I. L. R, 21 C, 70, and it has been held that a suit to set aside the sale must be brought within 6 months as prescribed by S 59 even though the sale may be illegal.

Ramanayya *v.* **Rangappayya,** I. L. R, 17 M, 144. Where a member of a joint Hindu family dies after attachment of his share of the family property in execution of a decree obtained against him individually, his share remains liable for the debt. But when he dies before a decree is passed against him, his share passes by survivorship to his coparceners and the fact that it has been attached before judgment cannot render it liable for the debt.

Ponnayya Goundan *v.* **Muttu Goundan,** I. L. R, 17 M, 146. We agree in the decision in this case but not on the ground stated by the learned judges. Registration of a sale-deed of land has the effect of transferring ownership because it is the only formality required under the Transfer of Property Act. To say that delivery of the deed is required and that registration of the deed is tantamount to delivery of the same is a very round-about process of arriving at the result and involves the use of a fiction. Nor can we agree in the argument of the judges that a contrary view would defeat the object of the Registration Act the object being to let all the world know in whom the title to property lies. The object of the registration law is to provide that if there is a transfer of land, it shall take place by means which shall render it easily ascertainable by the public. It does not logically follow from this that the fact that a person has been registered as a transferee of land should conclusively vest the title in him. The fact of registration is not always an index to the title. For instance a person may execute a nominal conveyance of land to another but though the conveyance may be registered he will continue to be the owner.

Goswami Shri Girdhariji *v.* **Shri Govardhan Lalji,** I. L. R, 18 B, 290 and 294. The word *dwell* in Cl. 12 of the Letters Patent of 1865 relating to the Bombay High Court and in similar clauses in the Letters Patent relating to the other High Courts has long been construed to mean 'live permanently' *Sargent, C. J.* and *Telang, J.* held confirming *Farran, J,* that the mere buying of a house within the jurisdiction of the court is not sufficient to constitute the defendant a dweller within the jurisdiction unless an intention to make the house a permanent residence be proved. Counsel before the Privy Council thought this so clear that they did not contest it. Now it is important to note that in S. 17 of the Civil Procedure Code, the language used is not 'dwell' at the time of the commencement of the suit, but at the time of the commencement of

the suit *actually* and voluntarily *resides*. Is this different from 'dwell'? Mark the use of the word *actually* which would seem unnecessary if permanent residence was intended Moreover Explanation I to the section seems strongly to indicate that temporary residence is sufficient to give jurisdiction It lays down that where the cause of action arises not at the defendant's permanent place of residence, but at a place where he has a lodging for a temporary purpose only, he shall be deemed to reside at both places in respect of the cause of action arising at the place where he has such temporary lodging. Here the words permanent *dwelling* are used as well as *reside* which is used in the former part of the section. Does it not seem that the scheme of the section is that a suit may be brought in any one of three places, *viz.* (1) where the cause of action arises, (2) where the defendant permanently resides (for by force of the explanation the cause of action wherever it may arise is always deemed to arise also at his permanent place of residence), (3) where he is in fact living at the time of the commencement of the suit. (We omit the clauses with respect to the defendant's place of business). If we understand *reside* in the section to mean 'live permanently' it would be difficult to give a satisfactory meaning to the Explanation for it is absolutely superfluous to provide that the cause of action shall be deemed to arise at a temporary lodging where *ex hypothesi* it in fact arises.

In the case under notice, the High Court and the Privy Council also held that collecting offerings from one's disciples and keeping an office for that purpose cannot be held to be 'carrying on business' or working for gain within the meaning of the section.

Cursetji Jehangir Khambatta *v.* W. Crowder, I. L. R, 18 B, 299. *Audi alteram partem* is a rule of justice of universal application in the administration of justice in whatever form, whether by the established courts of justice, or by arbitrators or by special tribunals like caste punchayats, *Harvey* v. *Shelton*, 7 Beav, 455, Russel on Awards, p. 121. So *Farran J.*, refused to upheld an award when the arbitrator received evidence from one of the parties without giving the other party an opportunity of meeting it.

Lalitagar Keshargar *v.* Bai Suraj, I. L. R, 18 B, 316. The wife is bound to reside with the husband; and as her refusal to do so entitles the husband to sue for restitution of conjugal rights. The cause of action arises where the husband resides.

Framji Dorabji Ghaswala *v.* Adarji Dorabji Ghaswala, I. L R, 18 B, 337. An executor *de son tort* may be sued by a creditor of the estate though no letters of administration have been taken out, but we

think it is equally clear as held by *Candy* and *Fulton, JJ.*, that if the creditor is also shown to be an executor *de son tort*, he cannot maintain the suit without getting an administrator appointed. It would be impossible to adjudicate on the plaintiff's claim without taking an account of the moneys received by him as executor *de son tort* and this he has no right to call upon the court to do in a mere creditor's action for debt.

Moher Sheikh v. Queen Empress, I. L. R, 21 C, 392. Following the decision of the majority in *Queen* v. *Gopal Doss*, I. L. R, 3 M, 271 and *Queen Empress* v. *Ganu Sonba*, I. L. R, 12 B, 440, the Calcutta High Court has held that evidence given by a witness in answer to a relevant question may be used against him in a subsequent criminal proceeding unless he went through the farce of requesting to be excused from answering the question. The effect of this view is to render the privilege practically valueless in this country. We have discussed the subject at length in 2 M. L. J, 209 and expressed our entire concurrence in the opinion of the minority delivered by *Mr Justice Muthusami Aiyar*.

Dakhyani Debea v. Dolegobind Chowdhry, I. L. R, 21 C, 430. It is not necesssary to constitute *res judicata* that there should have been a formal issue about the matter in the former suit. It is enough if it was substantially in issue between the parties. Where in a suit to establish the plaintiff's right to crops standing on certain land the plaintiff's title is based on a particular document and that document is found to be false, the finding will operate as *res judicata* in a subsequent suit between the parties for the same land.

Azizan v. Matuk Lal Sahu, I. L. R, 21 C, 437. We agree with the majority of the court in thinking that where a decree has been satisfied by agreement out of court and such satisfaction has not been certified to the court, a separate suit cannot be maintained to restrain the decree-holder from executing his decree in contravention of his agreement. For a discussion of the question refer to our Critical Note on *Mukund Harshet* v. *Haridas Khimji*, 3 M. L. J, 146.

Jagannath Churn v. Akali Dassia, I. L. R, 21 C, 463. The Calcutta High Court has introduced the thin end of the reformer's wedge into the law relating to the disciplinary powers of castes in this country by holding that the mode of exercise of such powers by a caste can be questioned by the courts, even though the rules of the caste are not contrary to natural justice and the actual decision in the case is perfectly *bona fide* and in accord with its rules. The learned judges

hold that the fact of castes or sects being involuntary associations which people are born into and do not enter by choice renders inapplicable the rule of English Law in regard to voluntary associations that the courts should not interfere with their decisions in internal administration. Notwithstanding the distinction pointed out by the learned judges and the sympathy which one must feel for an attempt to break the tyranny of castes, we cannot help thinking that the decision is one of doubtful expediency. Castes and sects in this country take the place of voluntary associations in other countries and whatever influence for good can be exercised by social and class opinion is exercised through these bodies and it is desirable that nothing should be done to interfere with the free play of this influence.

Murti v. Bhola Ram, I. L. R, 16 A, 165. If an intervenor claims several properties by the same petition of claim and the court passes a single order upholding the claim relating to all the properties, a single suit should be brought by the creditor to establish his judgment-debtor's right to all of them or S. 43 of the Civil Procedure Code will bar all suits but the first, for as the Full Bench points out, the substantial cause of action is the order allowing the claim and that order is one and indivisible, though the judgment-debtor's title to the properties affected by it may not be the same. The Full Court held that when two suits are instituted on the same day, the one first registered in the register of suits must be taken to have been first instituted ; but the registration must be successive though the presentation may be simultaneous. What is to be done if both suits are presented together ? Moreover is it not the fact that the law does not recognize fractions of a day ? Suppose two documents affecting the same property are presented between 3 and 4 and registered on the same day. Would a presumption similar to that made by the Full Court in this case be valid as to the priority of the registration ? We doubt whether it would not have been sounder to follow *Kaleshar Prasad* v. *Jagan Nath*, I. L. R, 1 A, 650 and *Zahur Husain* v. *Muhammad Hasan*, Weekly Notes, 1888, p. 147 which held that where two suits are instituted on the same day, one of them cannot be dismissed under S. 43. In *Appasami* v. *Ramasami*, I. L. R, 9 M, 279 the Madras High Court dismissed one of the suits, but did not apparently think that priority of entry in the Suit Register proved priority of institution. In *Alagu* v. *Abdoola*, I. L. R, 8 M, 147, the plaintiff was allowed to withdraw both the suits and include the whole claim in one suit but *Edge, C.J.* refused to grant a similar request in the case under notice, on the ground that the whole claim would exceed the jurisdiction of the Munsif's Court in which the suits

were instituted. We do not see how this could be a ground for refusing permission to withdraw though it would for not giving leave to amend. The learned judge also held that S. 373 would not apply, for the defect was not a formal one, but clause (*b*) of the section extends to cases where the defect is not formal and leave has repeatedly been granted under the section where the party was to blame for the mistake. The Madras High Court applied the section to the very case in hand. The case was no doubt one in which a cause of action was wrongly split, but the proper course in such a case appears to us to be either to permit the withdrawal of the suits or to dismiss them both and in either case the plaintiff would be competent to maintain a fresh suit.

Mamman *v.* Kuar Sen, I. L. R, 16 A, 178. *Aikman, J.* recognized in this case as a customary right coming within the purview of the class referred to in S. 18 of the Easements Act, the right to place tabias on a certain plot of land during the Moharam. The essentials of such a right are pointed in 1 M, L. J, p. 47. The report ought to state the facts more fully so as to enable the reader to judge whether the decision is within the rule hitherto laid down.

Ram Dial *v.* Indar Kuar, I. L. R, 16 A, 179. The drafting of decrees appears to be done most negligently in this country in all the provinces. The work is done by some clerk possessing no legal experience and very little attention is devoted to it by the judge or chief ministerial officer. Maintenance decrees are a very prominent instance of this. In every High Court cases have arisen where the decree did not fix the date when the maintenance were to be paid. The court is in consequence compelled to treat such decrees as declaratory though the correctness of so doing may be doubted.

NOTES OF ENGLISH CASES.

Monson *v.* Tussand, Limited, Monson *v.* Louis Tussaud, 1894, I Q. B, 671. In an action for libel an interlocutory injunction will not be granted except in a clear case.

Per Lopes and *Davey, L. J.J*:—A clear case is one where a verdict to the contrary ought to be set aside as unreasonable.

Per Lord Halsbury and *Davey, L.J*:—The jurisdiction to issue injunctions in cases of libel is not confined to cases of libels affecting a trade or business.

Where the libel charged was the exhibition of a wax model of the plaintiff amidst surroundings which suggested that the plaintiff was concerned in a notorious murder, the plaintiff however having

been discharged on a verdict of "not proven" and the affidavits on appeal raised a question as to whether the plaintiff had consented to the exhibition, the court, (*Lord Halsbury*, *Lopes* and *Davey*, *L. J.J.*), held that it was not a clear case of libel to justify an interlocutory injunction.

Swyny v. Harland, 1894, I Q. B, 707. Where during the pendency of the appeal a stay of execution was granted on the applicant paying the taxed costs of the successful party to his solicitor, on the latter's personal undertaking to repay the same if the appeal should be successful, the court had power to enforce the undertaking summarily when the appeal succeeded, even though the appellate court stayed execution of its decree pending a further appeal.

The Queen v. Tyrrell, 1894, I Q. B, 710. It is not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in committing or to incite him to commit the misdemeanour of having carnal knowledge of her, contrary to S. 5 of 48 and 49 Vic., Ch., 69, the Act having been passed for the protection of women and girls against themselves.

Gough v. Wood & Co., 1894, I Q. B, 713. Where the mortgagor of premises who remained in possession made trade fixtures of machinery which belonged to a stranger and were removable by him if not paid for by a certain time and the stranger removed them according to the contract, held that no action would lie by the mortgagee against the owner of the machinery. Although the mortgagor may not remove property of his own which he has fixed, a third person has the right to unfix and carry away a chattel of his own which he has fixed at the request of a mortgagor in possession and for the purpose of enabling him to carry on his trade, a chattel, moreover, which has been fixed upon the terms that its owner may remove it if not paid for.

Per curiam :—If I employ a builder to build me a house and he does so with bricks which are not his, I apprehend that they become mine and that their former owner cannot recover them or their value from me.

In re **School Board Election for parish of Pulborough. Bourke v. Nutt,** 1894, I Q. B, 725. *Per Davey, L. J*:—It is a well-known principle in the construction of statutes that where the words admit of two constructions, you are not to construe them so as to produce a retrospective effect or impose disabilities not existing at the passing of the Act.

In re **Thomas. Jacques v. Thomas,** 1894, 1 Q. B, 747. Money was subscribed by strangers for the maintenance of litigation to be

repaid out of the property if recovered. The money was entrusted to A who retained a solicitor for the claimant and paid him large sums. After the unsuccessful termination of the litigation summons was taken out against the solicitor to tax his costs. Held that the solicitor could not resist taxation on the ground that the employment for which he was retained was illegal.

Allenson v. General Council of Medical Education and Registration, 1894, I Q. B, 750. Where the general council of medical education authorized by statute to erase the name of a medical practitioner from the register if found by them upon due inquiry to have been guilty of infamous conduct in a professional respect, did so erase the name of A, held that the court could not review their decision if there was evidence upon which the council could reasonably hold that A had been guilty of such conduct. Held also that if it is shewn that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded by his professional brethren of good repute and competency as disgraceful and dishonourable, it is open to the council to find that he has been guilty of infamous conduct in a professional respect.

Held further that the fact that a member of the council who took part in the inquiry had been a member and vice-president of the medical union which caused the inquiry to be instituted, did not invalidate the result of the inquiry for he had in effect ceased to be a member of the union by resignation before the inquiry, although according to the rules of the union his connection with it would formally cease only after the lapse of two months from the date of resignation, and he had taken no part in any of the meetings of the union which started the inquiry. The crucial question is whether in substance and in fact one of the judges has in truth also been an accuser.

Nell v. Longbottom, 1894, I Q. B, 767. Upon a petition against the election of the respondent as Mayor of a Town council, the court held that the respondent's vote in his favour was invalid as the office of Mayor had a salary attached to it and the vote was contrary to the statutory provision "that a member of the council shall not vote or take part in the discussion of any matter before the council or a committee in which he has directly or indirectly by himself or by his partner any pecuniary interest." The election was however held valid as the respondent had a majority with the casting vote of the chairman, one of the votes for the rival candidate being also invalid.

Per Cave and *Mathew, J.J* :—When, as the result of the chairman's giving his vote the numbers on either side become exactly equal, the

common law appears to have provided no way out of the difficulty. The institution of a second or casting vote, as it is called, is the creature of the statute law introduced for the purpose of avoiding the deadlock which would otherwise ensue.

Worcester City and County Banking Co., v. Firbank Pauling & Co., 1894, I Q. B, 784. A firm which carries on business within the jurisdiction may be sued in the firm name under Order 48 A, Rule 1, without leave, although it be a foreign or colonial firm the members of which are resident out of the jurisdiction.

Wigram v. Cox Sons Buckley & Co., 1894, I Q. B, 792. Where an action is brought and judgment recovered against co-partners in the firm name, if one of the members has left the firm to the knowledge of the plaintiff before the commencement of the action and does not appear to the writ in his own name, the plaintiff must have served him with the writ in order to be entitled to obtain leave to issue execution against such member or to have the question of his liability tried under rule 8 of Order 48 A.

Harris v. Beauchamp Brothers, 1894, I Q. B, 801 The court will not appoint a receiver at the instance of the judgment-creditor, merely because it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution.

The Singer Manufacturing Company v. The London and South-Western Railway Company, 1894, I Q. B, 833. The bailee of a sewing machine under a hire and purchase agreement deposited it at the cloak room of a Railway Station. After the determination of the bailment the owners of the sewing machine sought to recover it from the Railway Company. Held that the Railway Company had a lien on the sewing machine against the owners for the payment of the cloak room charges.

Per Collins, J:—The Company are common carriers of passengers' luggage and if they carried this sewing machine they would be common carriers of this sewing machine and would have a lien upon it against all the world in respect of the cost of carrying it. I do not see why they should not equally have a lien for receiving it and warehousing it in their cloak room.

Baker v. Carrick, 1894, I Q. B, 838. A solicitor acting on behalf of his client gave written notice to an auctioneer not to part with the sale proceeds of certain goods entrusted to him for sale, on the ground that the owners of the goods had committed an act of bankruptcy upon which an order in bankruptcy might be made against him. The owner

of the goods sued the solicitor for libel. Held that the occasion was privileged since the solicitor was acting in the ordinary course of duty to his client and the occasion would have been privileged had the client himself written the letter. *Blackham* v. *Pugh*, (2 C. B., 611) approved.

Per Lord Esher, M. R:—It is part of the ordinary duty of a solicitor to endeavour to secure the money due to his client by taking steps not necessarily arising in an action.

Boxsins *v.* **Goblet Freres,** 1894, I Q. B, 842. A solicitor acting on behalf of his client wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office and was copied into the letter book by another clerk. In an action for libel against the solicitor, held that the occasion was privileged since the publication to the clerks was necessary and usual in the discharge of his duty to his client and was made in the interest of the client. *Pullman v. Hill & Co*, 1891, I Q. B, 524 distinguished.

Tyrell *v.* **Painton,** 1894, P, 151. Where a party propounds a will prepared by a person who takes a benefit under it, the burden of shewing that the paper propounded expresses the true will of the deceased, is upon him. Also, wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved of the contents of the instrument.

The Celtic King, 1894, P., 175. The owner of a ship entered into an agreement with the defendants to fit her for a particular trade and run her for five years as one of the defendant's line. The ship-owner mortgaged her afterwards to A. The plaintiff became a second mortgagee with notice of the agreement and after the vessel had been running for two years as one of the defendant's line. The owner having made default, the first mortgagee took possession and sold her under the power of sale to the plaintiff. Held that the plaintiff was not bound by the agreement between the late owner and the defendants, for otherwise the power of sale of the first mortgagees would be restricted.

Ramsay *v.* **Margrett,** 1894, 2 Q. B, 18. A wife who had separate estate agreed to purchase her husband's furniture which was in the house in which they lived together. She stipulated for a receipt for the purchase-money which was given by him after the money had been paid to him. The receipt acknowledged the receipt of the purchase-money for the furniture and stated "they were now her absolute property." There was no formal delivery of the goods to her but they

remained in the house in which they were living. The goods were seized in execution of the decree against the husband. Held in an interpleader issue, that the receipt did not form part of the transaction passing the property in the goods to the wife, but that the property had passed to her by the prior and independent bargain and that the receipt therefore did not require registration under the Bills of Sale Act of 1878 and the wife was entitled to the goods.

Held also, *per Lord Esher, M. R*, and *Davey, L. J.* that the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.

Crozat *v.* **Brogden,** 1894, 2 Q. B, 30. The right of the defendant to security for costs in an action by a person resident out of the country is not affected by the fact that it is upon a foreign judgment obtained in the defendant's presence.

Reid *v.* **Rigby & Co.,** 1894, 2, Q. B, 40. The defendants' manager who had authority to draw on the defendants' banking account for their business but not to overdraw the account or to borrow money on their behalf, borrowed £20 from the plaintiff stating that he wanted the money to pay the wages of the defendants' workmen and gave as security a cheque signed in his own name *per proc* for the defendants. The manager had overdrawn the defendants' banking account and he borrowed this money for his own purpose to replace money of the defendant's which he had abstracted, but he paid the money into the defendant's account at their bank and used it to pay the wages of the defendant's workmen. In an action on the cheque and to recover the amount as money received to the use of the plaintiff, held that the claim on the cheque must fail as the defendants' manager had not acted within the limits of his authority and the plaintiff must be taken to have had notice of the limited authority under S. 85 of the Bills of Exchange Act of 1882.

Held however that the plaintiff was entitled to recover as the money had found its way into the defendants' possession and been employed for their benefit

Hebditch *v.* **MacIlwaine,** 1894, 2 Q. B, 54. To constitute a privileged occasion it is necessary that the person to whom the defamatory statement is made as well as the person making it should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably

believes that the person to whom it is made has such an interest or duty. *Tompson, Dashwood*, 11 Q. B. D, 43 overruled.

Wegg Prosser v. Evans, 1894, 2 Q. B, 101. An unsatisfied judgment against one joint contractor on a cheque given by him alone for the joint debt is not a bar to an action against the other joint contractor on the original contract. Two persons jointly became sureties for the plaintiffs' debtor. The debtor having made default one of the joint guarantors gave a cheque for the amount of the debt. He was sued upon the cheque and judgment obtained but it was not satisfied. Plaintiffs sued the other guarantor. Held that the causes of action on the cheque and on the guarantee were not the same and consequently the principle of *King* v. *Hoare*, 13 M & W, 494 and *Kendall* v. *Hamilton*, 4 App. Cas, 504 did not apply. *Drake* v. *Mitchell*, 3 East, 251 followed. *Cambefort* v. *Chapman*, 19 Q. B. D, 229 overruled.

Kleinwort, Sons & Co. v. Comptoir National d' Escompte deParis, 1894, 2 Q. B, 157. The payee of a crossed cheque specially indorsed it to the plaintiffs and posted it to them. A stranger having obtained possession of the cheque during the course of transmission oblitrated the indorsement to plaintiffs and substituting a special indorsement to himself presented it to the defendants' bank and requested them to collect it for him. They collected and handed over the money to him.

In an action for conversion by the plaintiffs, held that the defendants were liable for the amount of the cheque.

The Queen v. Sowerby, 1894, 2 Q. B, 173. An indictment for obtaining or attempting to obtain money by false pretences must contain averments stating the person to whom the false pretence was made and the person from whom the money was obtained or attempted to be obtained. The form of indictment in *Reg* v. *Hunter*, 10 Cox., 642 held bad.

Underwood v. Underwood, 1894, P, 204, A wife obtained a decree for divorce and an order under the Matrimonial Causes Act of 1886 that the husband should pay her £.40 a year by monthly payments. She married again. Subsequently by a writing not under seal, she and her second husband agreed with the late husband in consideration of £10 paid to them by him to give up all claims in respect of the payments directed by the order. £.16 was then due to her for arrears. Subsequently she issued a writ to enforce £.80 arrears of maintenance.

Held by the Court of Appeal that the agreement being for the release of all claims in respect of the maintenance order in consideration

of the payment of a sum less than the amount which was then due and payable under such order was invalid for want of consideration and did not prevent the wife from enforcing payment of the £. 80. *Cumber* v. *Wane*, 1 Sm. L. C., 8th Ed., 366 and *Foakes* v. *Beer*, 9 App. Cas, 605 followed.

Hamlyn & Co., *v.* **Talisker Distillery,** 1894, 2 Q. B, 202. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights under the whole or any part of the contract should be determined.

In re **Hallett & Co.,** *Ex-parte* **Cocks, Biddulph & Co.,** 1894, 2 Q. B, 256. Where a promissory note was endorsed by the payee and a guarantee obtained by the payee from a third person for the payment of the promissory note was also transferred to the endorsee of the promissory note, the endorsee cannot be considered to be a person holding a mortgage, charge or lien on the property of the debtors or any part thereof and is entitled on the bankruptcy of the endorser to prove as an unsecured creditor for the full amount of the debt without any deduction on account of the guarantee.

Ponting *v.* **Noakes,** 1894, 2 Q. B, 281. Where the plaintiff's field was separated from the defendant's by a fence and ditch belonging to the defendant and the plaintiff's horse died of eating of the branches of a yew tree which grew on the defendant's land and the branches of which extended over the fence and partly over the ditch, no part of the tree however extending over or up to the plaintiff's boundary, it was held that the defendant was not liable for the value of the horse, as he was under no duty to fence against his neighbour's horses.

Per Charles, J:—"The real test in such cases is whether the man or animal which suffered had or had not a right to be where he was when he received the hurt."

Per Collins, J:—"The possession of something attractive and injurious to cattle casts no duty on the owner to take precautions against their trespassing in pursuit of it, when he has not placed or kept it there with that purpose."

Underwood Son and Piper *v.* **Lewis,** 1894, 2 Q. B, 306. The contract of a solicitor upon a retainer in a common law action is an entire contract to conduct the action to the end, subject however to the right of the solicitor to determine the contract for good cause, giving

reasonable notice to his client of his intention to do so. A solicitor is not entitled to determine his contract by merely giving notice to his client and sue for costs incurred up to that date.

Quære: whether the illness or death of the solicitor would entitle him or his representatives to sue for costs already incurred although he had not performed his original contract by carrying on the action till the end.

Coulson v. Disborough, 1894, 2 Q. B, 336. Where a judge calls and examines a person as witness who has not been called by either party, neither party can cross-examine the witness without the leave of the judge. The judge should permit the parties to cross-examine the witness upon any answers adverse to them but should not allow a general fishing cross-examination.

Musurus Bey v. Gadban, 1894, 2 Q. B, 352. An ambassador is exempt from the jurisdiction of the court of the country where he is an ambassador not merely when he is actually accredited but also for a reasonable time after recall to hand over the affairs of the embassy to his successor.

Haufstaengl v. Empire Palace, 1894, 2 Ch, 1. Held that representation of a picture by *tableau vivant* formed by grouping in the same way as the figures in the picture, living persons dressed in the same way and placed in the same attitudes as the figures in the picture, is not an infringement of copyright in the picture.

Rouse v Bradford Banking Company, 1894 2 Ch, 32. Held by *Lindley & Kay, L. J.J.*, (*A. L. Smith, L. J.*, dissenting) that if a creditor has two principal debtors one of whom by subsequent arrangement between themselves to which the creditor is no party and does not assent, becomes primarily liable for the debt and such arangement is notified to the creditor, the one secondarily liable has thenceforth the rights of a surety against the creditor and is discharged if time is given to the other debtor. *Per curiam*: where the creditor bank allows the principal debtor an increase of his overdraft up to a certain time beyond the due date, it amounts to a giving of time as he disables himself from suing the principal debtor for a time.

Held also by *Lindley & A. L. Smith, L. JJ.* (*Kay, L. J.*, dissenting) that where the surety agrees with the principal debtor that the former should not be entitled to require the latter to pay the debt so long as he was kept indemnified against claims in respect of it, such agreement was an authority to the principal debtor to obtain time if necessary to pay the debt and the giving of time therefore by the creditor could not discharge the surety.

Per Lindlay, L.J: The ground on which the surety is discharged by an agreement to give time being that he is deprived without his consent of the right to call upon the principal creditor to require payment of his debt, the surety cannot be discharged where he agrees with the principal debtor not to require payment of the debt.

Per Kay L.J: It was always the law that if the creditor knew that the debtors to him were as between themselves in the position of principal debtor and surety, whether he knew this at the time when the debt was contracted or discovered it afterwards, that knowledge obliged him not to deal with the principal debtor alone so as to prejudice the surety. The law must be the same where by a subsequent agreement one of the principal debtors becomes a surety and this is made known to the creditor.

In re, **Duke of Marlborough, Davis** *v.* **Whitehead**, 1894, 2 Ch, 133. The Duchess of M, in consideration of natural love and affection assigned to her husband by an indenture a leasehold house belonging to her to enable him to raise money to pay his debts. The husband mortgages it and both covenanted to pay the mortgage debt, but the equity of redemption was reserved to the husband alone. After the death of the husband the wife claimed the house subject to the mortgage under an agreement to reassign it to her which she alleged and proved to have been part of the arrangement between them which if the husband had lived he would have carried out. Held that the agreement could be proved notwithstanding the statute of frauds, as the statute should not be used to cover what would amount to a fraud and the duchess's claim was therefore valid.

Keeth Prowse & Co *v.* **National Telephone Company,** 1894, 2 Ch., 147. Where the landlord notwithstanding notice to quit at the end of the term demands and receives rent up to a date beyond the term, the receipt of the rent operates as waiver of the notice and the landlord cannot sue to eject.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications :—

The Canada Law Journal for June (*in exchange*).

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Responsibility in Drunkenness :—I apply the word responsibility both to a subjective feeling of duty and also to a real accountableness to some outside power, but I shall have chiefly to do with the latter aspect of it. It necessarily implies two things in that case for a man to be responsible—1st, To have a feeling of what is right, and that a duty is laid on him, and 2nd, to have a power of control of action, and of spontaneity of conduct. I shall have occasion to refer to what I believe to be the fact that conscience, and duty, and responsibility, and control, are brain qualities as well as moral qualities, when looked at objectively and from the physiological side.

It has no doubt been the highest aim of law-givers and moralists, to fix and accentuate responsibility on every citizen of the state. To deepen responsibility has been to create order; to lessen responsibility has been to weaken society; to absolve from responsibility has been to degrade below a really human level, and to produce anarchy in consequence. Every man and woman is bettered and made more useful, the more responsible they become. If there is anything good in a man or even a boy, any latent potentiality of faculty, making him more responsible will be likely to bring it out. If there is no sense of responsibility in him, he is an unsafe ruler, servant, teacher, husband, and citizen.

Our laws admit of few cases in which there are degrees of responsibility resulting from imperfect powers of control, or in which graduated punishments are administered to different individuals for the same offence. Yet this seems unscientific if the conscience of a man is sensitive, and his power of control inoperative, through innate brain weakness. It seems unjust to lay the same burden on the strong as on the weak. The law certainly does admit the physiologist's contention that reponsibility is a brain quality, by absolving the infant, whose brain is undeveloped, from punishment altogether; and by allowing graduated and special punishments in the case of the child and early adolescent.* For the same reason, it absolves the insane person and the delirious person from responsibility and from punishment, substituting medical treatment at the public expense in such cases. I believe it makes special provision for diminished responsibility in certain special cases where, for instance, a wife is influenced strongly by her husband to commit a

* No act done by a person under seven years of age is a crime. In the case of persons between seven and fourteen, English law requires it to be shown, affirmatively at the trial, that there was sufficient capacity to know the act was wrong. In the same way, in questions of civil liability, children of tender years are seldom held capable of contributory negligence. For the punishment of the class technically known as juvenile offenders, see the Summary Jurisdiction Acts of 1879, and subsequently.

crime.* In short, it already admits exceptions to a universal rule of sufficient responsibility existing in all human beings to suffer the same punishment, or any punishment at all, for the same offence. The laws of different countries differ in the exceptions made. Where the law professes to be founded on a scientific basis, as in Germany and France, there are more exceptions and more "extenuating circumstances" admitted, and far more graduated punishments than with us. Many scientific jurists with us urge the application of the same principles in our legal enactments and in the administration of our criminal code.

I now proceed to consider some facts as to alcoholic drinks, and their effects on the human brain, in connection with the question of responsibility. It may be taken broadly that the use in moderation of certain drinks containing alcohol, especially if they are natural products of the soil, has never been regarded as ethically wrong or dietetically objectionable, until certain religious teachers arose to put them under a purely religious ban. I do not know whether Buddha or Mohammed assigned reasons or not for their prohibition of alcohol in every form to their followers. But the too frequent use or excess of alcohol was so manifestly injurious, that it was denounced by the more thoughtful among almost all peoples. At feasts and on special occasions, however, almost all primitive peoples used wine or other drinks freely, and even to excess, and the feeling was that the sin lay in abstaining, or practising undue moderation at these times. Among the Norsemen, in spite of their strong legal and moral instincts, crimes committed on these occasions by men manifestly under the influence of such drinks were lightly regarded and easily atoned for. Looking at the strictly physiological effects of alcohol on the mental working of the brain, the first effect of small quantities on a perfectly normal brain is that of pure stimulation. Feeling is made more pleasurable, thinking more rapid but not more reliable, imagination more active, speech more easy, and sometimes even memory is quicknened. But with these effects the *moral sense is lowered, the power of deliberate inhibition is lessened, and the resistive power against what is undesirable* or immoral is diminished. No doubt the social instincts and feelings are intensified, and with them a certain kind of goodness, in the shape of charity and benevolence, is evolved. But the "Dutch courage" of liquor is not true inhibition of fear, but a merely stupid clouding of the perception of real risks.

* In English law there is a general presumption that in certain cases, such as theft and issuing counterfeit coin, a wife acted under the compulsion of her husband, but this may be rebutted; and the presumption does not apply to cases of high treason and murder, although, of course, a defence of actual compulsion by threats of violence might succeed in such cases.

This early stage of alcoholisation is intensely pleasurable to many persons, and a craving is set up for its frequent recurrence. Alcohol acts on the higher brain functions at once, and before its action on any other tissue or organ is seen. It has, in fact, a special affinity for brain tissue. Taken in still greater quantity, it diminishes every form of control, mental and muscular, and leads to manifest irresponsibility of conduct. If there is an element of inherent morbidness in the brain subjected to the influence of alcohol, the desire for its effects is apt to become through repetition a craving, and through frequent indulgence that craving becomes more intense and the inhibition over it less and less, until in some cases control is absolutely lost, the man becoming quite powerless to resist it. To take an extreme case. I once saw a boy, the son of an insane drunken mother, who, after getting one glass of whisky, his first, about the age of sixteen, had from that time a craving for alcohol that he could not master, no motives could influence, and no punishment had the power of deterring him. His brain was pathological in its constitution, no doubt, but intellectually he was fairly sound, and did not come within any of the present conditions for which the law would have exempted him from punishment for acts committed when drunk. As a matter of fact, he committed larceny and acts of violence, and was sent to gaol for these. Now the question is, was this right? Should not the law provide for treatment and cure, rather than punishment in such a case? I have little doubt that if he had not been accidentally drowned at sea, to which I recommended his being sent as being the only practical mode of compulsory abstinence for him, he would have committed serious crime. He was a "dipsomaniac" as we say, and I counted him perfectly irresponsible, but the law did not. I contend that in such cases the law is wrong and unscientific in not taking account of facts.

This case is a type of what the whole medical profession now has concluded is a disease affecting the brain and mind, and that it should be treated medically and that those who suffer from it should be deprived of full personal liberty and some of their civil rights by process of law in consequence. To take another case. I have seen a woman, moral, self-controlled, with no craving for alcohol, but, on the contrary an abhorrence of it, and a strong sense when in her ordinary condition of the sin of indulging in it to excess, who, during the time of each of her pregnancies, developed a quite incontrollable craving for it, which she indulged until she was besotted as often as she could. After delivery this craving passed off, and she had normal power of control, and we bewailed her acts of drunkenness when pregnant. In both

these cases, and in most true dipsomaniacs, the moral sense that drunkenness is wrong and the feeling of shame after being drunk were gone, as well as the loss of outward control. But I have known cases where, from a diseased condition of brain, there was an inward moral sense of right and wrong in regard to the matter all the time, and yet no power of control over action in regard to getting drunk.

The most typical cases of dipsomania are apt to lose all moral sense and control on other matters than drink. Lying, dishonour, fornication, adultery, idleness, theft low cunning, treachery, often accompany this disease, and all those lapses from self-control and responsibility may pass away and be "recovered from," as a disease is recovered from, when the drink craving has passed off the brain in certain cases. Such "attacks of irresponsibility," for such they are, are frequently periodic recurring and passing off like so many other nervous disease.

The Red Indian after he gets "fire water" acquires such a craving for it that he loses all control over his conduct, and becomes irresponsible and as a matter of fact is treated as such by our Government and by the United States also. The law and politicians here recognise facts.

In addition to such cases, we have the man who began with moderate doses of alcohol, gradually increased the amount, and after many years is found to have lost the power of control over his conduct. The alcohol has, in fact, established as a permanent condition of brain, even when it is not circulating in the blood, the state of inhibitory paralysis, which is characteristic of actual drunkenness. Just as the paralysed or convulsed man cannot control the motions of his legs, so this kind of drunkard cannot control his craving, and will break the law to gratify it. We can now prove by microscopic examination that such a man's brain is diseased, just as certainly as we can prove the lungs are diseased in pneumonia. Is he to be held responsible and punished, or not, when he has reached this stage, even though it is fully admitted he was responsible for the excesses that led to it? There was a stage at which he had normal control. He, by using his judgment, could have concluded that he would lose his control at last, if he persisted in his drunkenness. He was certainly, at first, responsible for what led to his irresponsibility; but if he commits murder, when so medically irresponsible, the law hangs him if he "knew right from wrong in regard to the act of murder." It sets up a test of knowledge when the man's deficiency is not knowing, but willing. No doubt the law makes one distinction in regard to this matter. If a man commits a crime when drunk he is punished;

if he commits a crime when delirious from the effects of drink, the drink not being then in him, he is not punished, but held to be irresponsible. Alcoholic murder may, as the law stands, send a man to the gallows, or the hospital for the insane, according to whether the murderer took the whisky the day he did the deed, or the week before.

The question of the drunkard's own personal liberty is one that at present the law does not interfere with, however irresponsible he may be in medical opinion, unless he can be certified as insane under the lunacy laws. He cannot now be lawfully deprived of his liberty or even restricted in it. Any drunkard may legally drink himself to death, though other kinds of suicide are held to be criminal. Even in such a case as the woman who had the irresistible craving for drink during pregnancy only, nothing could legally be done to save her from disgrace and her unborn child from being soaked in alcoholic lymph during most of its intra-uterine life.

The lawyers and politicians will ask very properly, "What tests are there of a pathological and irresistible craving"? As yet we must reply that there are no absolute tests, and that there is no dividing line between responsible punishable drunkenness and irresponsible dipsomania. But we say that, like many other medical diagnoses and legal decisions, it is a question of the balance of probabilities, the decision being made by skilled medical men, who are at present allowed by the law to distinguish between sanity and insanity, with a view to the necessary deprivation of liberty in case of the insane for the purposes of treatment and of safety, there being no dividing line between sanity and insanity any more than there is between light and darkness.

Another question will at once arise when the dipsomaniac is pronounced irresponsible as to drinking, and is shut up and prevented by law from having any drink at all. Is this irresponsibility to extend to other conduct than that connected with drink? If during his period of deprivation of liberty he commits a murder, is he to be hanged or not? This will be a crucial test of degrees of responsibility. The law should not necessarily let the dipsomaniac off altogether for crimes committed during his period of drink irresponsibility, because his morbid, incontrollable craving for drink need not, in any way, compel him to theft or murder. No doubt, as I have pointed out, his whole moral sense may be perverted, but drink is the only thing that all the cases crave irresistibly. I should insert in any Bill for the seclusion of dipsomaniacs a clause that during their period of enforced treatment,

they should be held responsible for all crimes committed when sober and punished in some way, unless proved by medical evidence to be irresponsible in regard to other things than drink. In fact, I would advocate partial responsibility, and different punishments for the same crime in such cases, according to the degree of responsibility present. This will no doubt be absolutely against all legal instincts. But go back to the case of the ordinary boy, and ask why a law that works well and justly, when conditioned by facts in regard to the degree of responsibility of a non-developed brain, will not work justly and well when applied to a pathological brain? All schools and all asylums for the insane are governed on the principle of partial responsibility, the punishments and deprivations being regulated by the degree of power of control over conduct existing in the offenders.

There are many brains in adults so abnormal in quality and reaction, that a very small amount, indeed, of alcohol, opium, morphia, or cocaine, will absolutely destroy their power of control, or excite a craving that a normal control cannot inhibit. In some such cases there is set up violent tendencies to suicide, and then the irresponsibility is seldom questioned; in others, to murder, and then it is often questioned; in others to crimes against property, and then it is always questioned. Or if two glasses of whisky set up an attack of acute mania and delirium, called *mania a potu*, in a young man's brain, as I have seen over and over again, we say that brain is morbidly unstable, and we hold him quite irresponsible for acts done while the mania lasts. Are we ever after to hold him responsible for taking the drink which he knows, from experience, will have that effect on him? We certainly hold him morally responsible for the consequences of his drinking, but I do not see that we can make him, if he was really delirious when he did the criminal act, legally responsible, and punish him. Here the moral responsibility and the legal accountableness are divorced.

Take another common case. A man, in all respects moral, and with normal power to obey legal enactments, and with no craving for drink, becomes epileptic, gets sunstroke, or receives an injury to his head, and after that, drink in the smallest quantity makes him homicidal and dangerous. Is he to be held legally responsible and punished for a murder or an assault done under the influence of one glass of whisky? I think this is a case where the law should take the pathological facts into consideration in awarding its punishments.

Take another and more debatable case. What about the man's full legal responsibility who, with a bad brain by heredity, has been

brought up in the slums, has got alcohol to excess in the most injurious form—say London gin—and has had his brain thus poisoned from his cradle, has been educated to look on it and its effects as necessary to a right enjoyment of life, whose moral sense and mental inhibition have never been educated or developed, whose brain has never acquired its highest powers—is this man to be treated as fully responsible when at twenty-five he murders his paramour in a drunken bout? No doubt this is a difficult case, but it seems to me that provision for a lessened responsibility and a graduated punishment, should in this case too be made in a system of scientific jurisprudence. The whole question of heredity, one of the most potent factors in brain qualities, and, therefore, in conduct and power of control, is at present absolutely outside of legal enactment or judicial cognisance. No evidence on the subject will even be allowed by many judges. Is this careful elimination of a relevant fact scientific jurisprudence? And does it tend towards such an administration of the law as promotes social order?

I know that most lawyers and some politicians and many of the public will urge against this system of graduated and partial responsibility in regard to drunkenness being introduced into our jurisprudence, amongst others, two very strong objections. The first would be this: "The system you propose puts the real power of punishment for offences against the law in certain cases virtually into the hands not of a judge and ordinary jury, but of specialists in brain pathology. We do not believe in this principle. It is one that is contrary to the spirit of the common law, and may lead to consequences dangerous to society in its application. What guarantee have we that your specialist witnesses will act on the same principles in every case, and will agree one with the other? Your tests are admittedly defective, and leave a debatable land of uncertain extent and quality between full responsibility and irresponsibility." I admit the force of some of this reasoning, but I say, in answer, that sooner or later law must follow fact in brain pathology and its effect on human conduct. I admit that the specialist, whose opinion is virtually to decide those questions of legal responsibility and irresponsibility, of liberty and punishment, must not be anyone who chooses to call himself a specialist. We must have regularly appointed specialist assessors to our Courts, trained men acting with a judicial sense of responsibility; and we have the final guarantee of the trained lawyer on the bench, who will have to judge as to the strength and conclusiveness of the specialist's reports and evidence.

The second objection will be still stronger and more popular. It will be that: "After all, the law does not judge of the rightness and

wrongness of moral conduct. It merely makes penal certain kinds of conduct that are inconsistent with the well-being of social order. It does not need to enquire too closely into the question of responsibility. Its great object is to create a strong conviction in every man and woman's mind that control over conduct in certain directions is required by the law, and that the want of it will be inevitably followed by punishment, so deterring from the commission of crime—thus strengthening control in mankind generally, and promoting law-abidingness; while the notion that murder is not murder if the murderer was not fully responsible by reason of a pathological state of his brain, which still left him his reasoning faculty; or a theft was not theft if the thief's brain cells were not working normally would have worse effects in unsettling men's minds on cardinal legal points than would be the effect of an occasional irresponsible murderer being wrongly hanged. Why should a drunkard be saved from the consequences of his acts more than anyone else? Society is not yet fit for such doctrines of partial responsibility, and it would be highly dangerous in its general effect to have them established. It has got to be made to hate crime and to condemn drunkenness, and what you propose will weaken those all-important sentiments. Your proposal is against the instincts, and above the understanding of the average man, and with him we have chiefly to do." No doubt there is immense force in this line of objection. One can only say in reply, that law, like everything else, must develop and meet new conditions of society. Above all, it must follow facts; and we maintain that we have discovered new facts in regard to the pathological effects of drink on the brain and on conduct. One could point out that this sense of justice and of the invariableness of law will not be strengthened in society the moment it gets to realise that the law is perhaps harsh and really unjust. Witness the coroner's verdicts of "temporary insanity" in cases of suicide. See the verdicts of juries in cases of child murder soon after child-birth. Look at the strenuous efforts to have capital sentences commuted when some of the public think they may be undeserved. By these and by many other signs, the public show that it is getting ripe for an alteration of the law in regard to such questions as the full responsibility of drunkards.

In regard to the enactment of a law for detaining habitual, irresponsible and uncontrolled drunkards and placing them under treatment *nolens volens* the legal objection that it is more dangerous to deprive one man of his liberty unjustly, than to let a thousand drunkards kill themselves, injure society, and subject their families to indescribable misery, seems to me founded on such a conception of the importance of 'the liberty of the subject" as amounts to a baneful superstition. If